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IN THE

Supreme Court of the United States

October Term, 1968

No. 973

GERARDO RESTAINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, Gerardo Restaino, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on December 27, 1968.

Citations to Opinions Below

There was no opinion rendered in the United States District Court for the District of New Jersey. The opinion of the United States Court of Appeals for the Third Circuit is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 27, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented for Review

1. Can petitioner's conviction for bribery of a public official be sustained if the jury was not properly instructed as to the difference between a general criminal intent as opposed to a specific intent to influence the behavior of the public official?

2. Does not an Appellate Court have a right to review a sentence even though the sentence imposed is within the limits prescribed by law.

The statutory provision involved is Section 201(b) of Title 18 U.S.C. It is printed in Appendix B of the Petition for Writ of Certiorari filed by the co-defendant Joseph Mustacchio.

Statement of the Case

Petitioner, Gerardo Restaino, appeals from a conviction in the United States District Court, and affirmed by the United States Court of Appeals, wherein he was found guilty following a jury trial of the crime of bribery of a public official in violation of 18 U.S.C. § 201(b). Petitioner was sentenced to 5 years in jail. Petitioner is presently on bail.

As the arguments on this Petition are directed to the charge of the trial court, as well as the sentence imposed by that court, a review of the trial testimony will not be undertaken.

REASONS FOR GRANTING THE WRIT

I

The trial court erred in its instructions to the jury concerning the essential element of a specific intent—the resulting attempts to cure this error produced such confusion as to absolutely prevent a fair jury determination.

Petitioner, in support of his position hereunder, refers to Argument (b), set forth on pages 6 to 13, of the petition of the co-defendant Joseph Mustacchio and incorporates herein in its entirety the argument therein set forth. Reference is made to that portion of the trial court's charge wherein reference is made to the defendant Restaino with respect to the element of intent. The trial court's instruction, and subsequent remedial instruction, respecting the element of intent was identical as to both defendants. Accordingly, and for the reasons set forth in the co-defendant's petition, it is submitted the the trial court's instructions constituted reversible error.

II

The sentence imposed by the trial court was unduly harsh and oppressive and constituted an abuse of discretion.

As heretofore noted, petitioner Restaino was sentenced to a term of 5 years. An examination of the transcript on the date of sentencing shows that the trial court conceded that this petitioner "played a lesser role" in the crime charged. The court, however, stated that it considered the offense in question to be a great threat to society. As stated by the court:

> "I cannot think of any greater threat to law enforcement than the bribery of public officials."

It is submitted that in the context of the instant case the afore-quoted statement of the trial court is unwarranted. While recognizing that the court could have imposed a sentence up to 15 years, the imposition of a 5 year sentence to a young man who has never been imprisoned before is harsh and oppressive under the circumstances.

In seeking to have this Court review the sentence imposed this writer is mindful of the division of opinion on the issue of appellate review of sentences. See *Rubin, Disparity and Equality of Sentences,* 40 FRD 55 and *Brewster, Appellate Review of Sentences,* 40 FRD 79. It is submitted that the better practice is to permit appellate review where it is warranted. In *United States* v. *Wiley,* 278 F. 2d 500 (7th Cir. 1960), the court stated:

> "Only in an exceptional case will this court interfere with the discretion exercised by a district court in imposing a sentence upon a defendant in a criminal case. * * * In so doing it is exercising its supervisory control of the district court, in aid of its appellate jurisdiction. This control is necessary to proper administration in the federal system." Supra at p. 503.

See also, *State* v. *Johnson,* 67 N.J. Super. 414, 170 A.2d 830 (App. Div. 1961); *State* v. *Juliano,* 52 N.J. 232, 245 A.2d 17 (1968). The Appellate Court herein held that the sentence was not reviewable. It is respectfully suggested that a better practice would permit a review.

It is submitted that the sentence imposed herein was harsh and oppressive and thus constituted an abuse of discretion.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted

GLICKMAN & VALENTINE
Counsel for Petitioner

By PETER S. VALENTINE

PETER S. VALENTINE
on the Petition

APPENDIX

Sentences and Applications for Bail

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Crim. No. 342-67

UNITED STATES OF AMERICA

v.

GERARD RESTAINO and JOSEPH MUSTACCHIO,
Defendants.

Newark, New Jersey,
January 5, 1968

Before:
THE HONORABLE ROBERT SHAW, *U.S.D.J.*

Appearances:

UNITED STATES ATTORNEY, by GEORGE J. KOELZER, Esq., Assistant United States Attorney, for the Government.

PETER S. VALENTINE, Esq., Attorney for defendant Restaino.

MATTHEW P. BOYLAND, Esq., Attorney for defendant Mustacchio.

Sentences and Applications for Bail

Mr. Koelzer: In the matter of Gerard Restaino and Joseph Mustacchio, on October 17th, 1967, a jury in this Court found the defendants guilty of the charge of bribery, and they appear before the Court with their respective attorneys for the purpose of sentencing.

Mr. Valentine: Your Honor, may it please the Court, I know your Honor is familiar with the facts in this case. The trial took about four or five days and it was tried quite recently. Now, I know your Honor also has before him, I am sure, a probation report which is complete in form, and I am sure that report will show that Mr. Restaino's past is good one as far as his ability to comply with the standards of law enforcement and order. I think the one blemish in his record deals with a Newark municipal offense which took place sometime ago, but other than that fact, Mr. Restaino has been able to and has lived a good life as a civilian, your Honor.

The Court: Let me stop you there for a moment, because I don't want to base the decision on any information that may be inaccurate. I, of course, will not consider a juvenile offense which is listed. That I will not consider, but I have his adult record, January 4tb, 1961, conviction of larceny of a grocery store. I have 1962, an assault and battery conviction. Those are two I have, and then, of course, I understand—I don't know whether it is correct—there is a pending indictment for possession of goods stolen from interstate shipment. That will not be pertinent, however. There is a presumption of innocence until found guilty. That will not be given consideration.

Mr. Koelzer: May I be heard for one moment? There is a complaint and warrant outstanding. There has not yet been an indictment returned until the conclusion of this case, but there is a charge pending of theft from intertate shipment.

The Court: I will accept that correction.

Now, as to the other offenses.

Mr. Valentine: There is no indictment, your Honor.

The Court: What about the other two?

Mr. Valentine: The offense I had reference to is that grocery store. He told me the other one had been dismissed.

The Court: On the record here I have "Found guilty. Given credit for time spent." Apparently time spent while in jail, that is as I read it.

Mr. Valentine: Is that also in the Municipal Court?

The Court: That is not indicated.

Mr. Valentine: He indicates he has never been in jail.

Defendant Restaino: On the grocery store thing, I was just locked up overnight.

The Court: All right.

Mr. Valentine: When I had reference to one offense it was the grocery store offense that he indicated to me, and that I had indicated to the Court was disposed of in the Newark Municipal Court.

Now, your Honor I am sure knows the age of the young man and your Honor also knows his family background. He is presently and he has been for a short period of time separated from his wife. He has been living with his mother and brother, and he is attempting to effect a reconciliation with his wife.

He has advised me that at no time has she ever charged him with non-support, that he has fulfilled his obligations with respect to the support of his wife, although he has in fact been separated from her.

Now the type of a situation that we have before the Court at this time, for which there is a statute that the Grand Jury has indicated Mr. Restaino violated, and the jury found him guilty of, I would like to direct your Honor's attention to his role as far as the facts in this case indicated with respect to that particular charge. I don't want to go through the whole trial because I know your Honor is familiar with the facts, although there have

been other things before your Honor since October, I am sure, but his role, your Honor—and he was picked up for having these liquor cases in his trunk. He was not the one—he is not charged with being the person who made any effort. He was there when certain conversations took place between the FBI and other individuals. He was standing there. He did not actively encourage any conversations. He stood there, so perhaps from his silence he was guilty, and furthermore when all the events took place leading up to the arrest in this building later on in the morning of that day, during the hours that he was in custody here, again his guilt is in silence. He didn't go out. He didn't obtain money, so I ask your Honor to consider his role in this case.

I also ask your Honor to consider whether this man is any threat to society because of the type of offense that has been charged here. Does he represent a danger to any citizens because of the type of crime he is charged with and convicted of in this case?

These facts, your Honor, his youth, his past record—and as I indicated there is one blemish on that record. I ask your Honor, because of all these factors—I know there are times that the Attorney General has said this is the most serious crime, but I ask your Honor to be lenient, to consider his role in this whole matter, and I ask your Honor to consider what threat he poses to society.

I ask your Honor to be lenient on the sentence.

The Court: Of course, Mr. Restaino will have a chance to talk for himself, but I think in fairness I should bring to your attention some aspects of the matter I am considering, and you can bring out the answer to the extent that Mr. Restaino can answer it.

The record I have before me indicates that he has not been gainfully employed since March of 1967. I consider that another aspect of irresponsibility together with the marital situation. Do you have any comment on that?

Mr. Valentine: I am aware of that fact, your Honor, and Mr. Restaino has frankly and candidly advised the probation department of that situation. He did not try to hide that fact. He has been trying to get employment in a certain area and he has not been able to do so.

The Court: The information I have also is that he applied for unemployment insurance benefits and after receiving the benefits for four weeks his claim was dismissed on the basis that he failed to seek employment; is that correct?

Defendant Restaino: I was seeking employment, but they said I was not looking hard enough, and I could have appealed it, but I didn't, the dismissal of unemployment benefits.

The Court: Have you anything else to bring up?

Mr. Valentine: No, except he advises me he sought employment in a certain area and he has not been able to get that.

The Court: Are you finished, counsel?

Mr. Valentine: Yes, sir.

The Court: Mr. Restaino, you have a right to speak in your own behalf. You can be assured that I will listen carefully to everything you tell me and give it such consideration as I think it may deserve. You may feel free to speak. My obligation is to hear you and to hear you fairly and to give reasonable consideration to everything that you tell me that I think deserves consideration. You may feel free to speak.

Defendant Restaino: The only thing I have to say is I have been looking for work. I am trying to get back together with my wife as soon as I get a job. I have been seeing my wife, you know, every day, and as soon as I get back to work we will set up an apartment again and go back together.

The Court: Anything further?

Defendant Restaino: No, sir.

Sentences and Applications for Bail

The Court: The information I have indicates a pattern of irresponsibility. It has been urged that the offense is not the kind that poses a threat to society. I am afraid that I disagree. I cannot think of any greater threat. I cannot think of any greater threat to law enforcement than the bribery of public officials.

Apparently it was felt here—and I don't hesitate to use the word *brazenly*—that public officials could be bought.

I presided at the trial. I heard the evidence, and while, as Mr. Valentine knows, and Mr. Restaino knows, I was most scrupulous and meticulously careful not to convey any impressions to that jury, advising and instructing the jurors that they were the sole judges of the facts, but I can say to you now that I have reached the same conclusion in my own mind that that jury reached.

It is the sentence of the Court in your case that you be placed in the custody of the Attorney General of the United States and by him or his accredited representative committed to an appropriate institution for a period of five years.

That is the sentence of the Court.

I might add in connection with this sentence that if it weren't for your youth and I would say perhaps a lesser role played in this, the sentence would have been more severe.

That is all.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17078

UNITED STATES OF AMERICA,

v.

GERARDO RESTAINO,

Appellant.

No. 17079

UNITED STATES OF AMERICA,

v.

JOSEPH MUSTACCHIO,

Appellant.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 7, 1968

Before McLAUGHLIN, STALEY and VAN DUSEN,

Circuit Judges.

(Filed December 27, 1968)

Opinion of Court of Appeals

By STALEY, *Circuit Judge.*

Appellants, Joseph Mustacchio and Gerardo Restaino, were jointly tried and convicted by a jury of violating 18 U.S.C. § 201(b)[1] by bribing a public official. From their judgments of conviction these appeals followed.

Both appellants contend that the district court erred by confusing the jury with its charge on criminal intent.[2] In its initial charge, the court instructed the jury that criminal intent could be proven by circumstantial evidence and that it was permissible for the jury to draw the inference that a person ordinarily intends the natural and probable consequences of acts knowingly done. The court further charged that unless the contrary appeared from the evidence, the jury could infer that the defendants intended all the consequences which one standing in like circumstances and possessing like knowledge would have reasonably expected to have resulted from any act knowingly done. At the close of

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[1] "201(b). Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

"(1) to influence any official act; or

"(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

"(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty * * *

"Shall be fined not more than $20,000 * * * or imprisoned for not more than 15 years, or both * * *." 18 U.S.C. § 201.

[2] This contention, and the alleged support therefor, is set out in Mustacchio's brief. Restaino indicated in his brief that he adopted Mustacchio's argument on this point *in toto*.

the charge, Mustacchio's counsel objected to the "natural and probable consequences" instruction on intent, *cf.* United States v. Barash, 365 F.2d 395, 402 (C.A. 2, 1966), and requested that it be qualified in certain respects. In response to this request, the court excused the jurors and instructed them not to begin their deliberations. Mustacchio's counsel was then asked to write out and submit to the court a remedial instruction that would cure any error in the initial instruction. Counsel did this, but then asked the court to withdraw his proposed corrective instruction because he apparently believed it to be inadequate. After an extended discussion, agreement was reached between Mustacchio's counsel and the court concerning the substance of the corrective instruction. The jury was then called into the courtroom and given the supplemental charge. Counsel for both defendants indicated their satisfaction with the court's revised charge.[3]

We have carefully examined the corrective instructions, and we fail to see how confusion could have emanated from the district court's patient and judicious handling of this matter. Aside from the fact that appellants' counsel did not object to and actually agreed with the supplemental instruction, the record clearly discloses that the court directed the jury to ignore its previous instruction regarding criminal intent and then proceeded to set out in detail the proper criteria for determining the existence of *mens rea*. We must assume that the jury followed the court's instructions, Cook

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[3] After the jury retired, the court stated that "in accordance with my suggestion, at the completion of my supplemental instructions each of counsel for the defendants nodded their agreement, which I take it is to the effect that they were satisfied with the remedial instructions."

The record shows that counsel for appellant Mustacchio responded, "yes, sir."

v. United States, 354 F.2d 529 (C.A. 9, 1965), for "[t]o say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions". Opper v. United States, 348 U.S. 84, 95 (1954). There was clearly no reversible error here.

In a related contention, Mustacchio argues that the jury may have been confused by the court's charge that the Federal Aider and Abettor Statute, 18 U.S.C. § 2,[4] might apply depending on how the facts were found. Here again we note that although the district court allowed ample opportunity for counsel to object to any portion of the charge, no objection was voiced concerning this instruction. In the absence of a timely objection in the district court, Mustacchio cannot raise the issue here unless he establishes that the aiding and abetting charge constituted plain error. F.R. Crim. P. 30, 52(b). See also, United States v. Casavina, 368 F.2d 987 (C.A. 3, 1966), cert. denied, 385 U.S. 1006 (1967); United States v. Provenzano, 334 F.2d 678, 690 (C.A. 3, 1964). This he has not attempted to do; he merely alleges that the charge could have created some confusion. Our examination of the charge convinces us that there is no basis for this contention. The court properly advised the jury of the possible application of 18 U.S.C. § 2, and we can see no error—plain or otherwise. *Cf.* United States v. Provenzano, supra at 690-691.

Mustacchio next argues that he was denied the effective assistance of counsel because his counsel had been contacted only the day before the case came to trial and the

[4] The Aider and Abettor Statute, 18 U.S.C. § 2, punishes one as a principal who indirectly causes an act to be done which, if done directly by him, would be an offense.

district court abused its discretion in denying his request for a continuance to prepare the defense. In Ungar v. Sarafite, 376 U.S. 575 (1964), the Supreme Court stated:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." 376 U.S. at 589.

It is apparent from the Court's opinion in *Ungar* that there are no mechanical tests for determining an abuse of discretion; rather, careful attention must be given to the facts of each case when deciding whether there was a due process violation. The record in the instant case discloses that three different attorneys represented Mustacchio and that a continuance was caused when the second attorney was discharged as trial became imminent.[5] The record also

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[5] On the morning of their arrest, both appellants were represented by Mr. Querques before the United States Commissioner. Later, both men were represented by Peter Valentine at the arraignment on August 18, 1967. The case was listed for trial on September 26, 1967. On that date Mr. Valentine informed the United States Attorney that he would not represent either appellant because he had not obtained a retainer from them. A retention of counsel hearing was then scheduled for September 29, 1967, and the trial date adjourned to October 2, 1967. At the September 29 hearing, Mr. Valentine disclosed that he had been retained by Restaino but that Mustacchio did not wish to be represented by him. Trial was then continued until October 10, 1967, to allow Mustacchio to retain counsel. One week later, on October 6, 1967, a second retention of counsel hearing was held at which Mustacchio appeared and requested another continuance, saying that he had been unable to secure an attorney. The request was refused, and Mustacchio was told to get a lawyer by October 10, the date of the trial.

When court convened on October 10, Mustacchio appeared with attorney Matthew P. Boylan, who informed the court that he had

reveals that Mustacchio's counsel was given the Government's entire file prior to the commencement of the trial, and that Mustacchio was defended in a highly competent and professional manner.[6] As stated by the Court of Appeals for the Second Circuit in United States ex rel. Davis v. McMann, 386 F.2d 611, 618-19 (C.A. 2, 1967), cert. denied, 390 U.S. 958 (1968):

> "* * * Though a defendant has a right to select his own counsel if he acts expeditiously to do so, Releford v. United States, 288 F.2d 298 (C.A. 9, 1961), he may not use this right to play a 'cat and mouse' game with the court, Releford v. United States, 309 F.2d 706 (C.A. 9, 1962), or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel. * * *"

On the facts of this case, we are unable to perceive any violation of Mustacchio's Sixth Amendment rights. *Cf.* United States v. Abbamonte, 348 F.2d 700 (C.A. 2, 1965),

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been called in on the case on October 6 and had talked to Mustacchio briefly on October 9 but had informed appellant that he could not represent him unless a continuance was granted to allow him time to prepare the case. The trial court refused the continuance and ordered Mustacchio and attorney Boylan to discuss the matter and make a definite decision as to the representation. The decision was made that Mr. Boylan would represent Mustacchio. He then requested that trial be adjourned for another week, a request denied by the trial judge.

[6] A reading of the transcript of the trial discloses numerous objections made by counsel for Mustacchio that demonstrate his thorough understanding of the case. The objection to the court's initial instructions on criminal intent was made by Mr. Boylan and the ensuing discussion on this point with the trial judge indicates the competence on the part of counsel in this case.

cert. denied, 382 U.S. 982 (1966); Leino v. United States, 338 F.2d 154 (C.A. 10, 1964); United States v. Bentvena, 319 F.2d 916 (C.A. 2), cert. denied sub nom. Ormento v. United States, 375 U.S. 940 (1963), *with* United States ex rel. Mathis v. Rundle, 394 F.2d 748 (C.A. 3, 1968).

Restaino's only argument, other than his adoption of Mustacchio's challenge to the district court's charge on criminal intent, is that the sentence imposed on him was unduly harsh and oppressive and constituted an abuse of discretion. Our study of the record discloses no abuse, and since the sentence imposed by the district court was in conformity with the statute, it is not reviewable here. Gore v. United States, 357 U.S. 386 (1958); United States v. Brown, 382 F.2d 52 (C.A. 3, 1967); United States v. Frank, 245 F.2d 284 (C.A. 3), cert. denied, 355 U.S. 819 (1957).

We have given due consideration to all contentions advanced by appellants; we find no merit in any of them. Accordingly, the judgments of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17,078

UNITED STATES OF AMERICA

vs.

GERARDO RESTAINO and JOSEPH MUSTACCHIO

GERARDO RESTAINO,

Appellant.

(D. C. Criminal No. 342-67)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

McLAUGHLIN, STALEY and VAN DUSEN,
Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 5, 1968, be, and the same is hereby affirmed.

Attest:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

December 27, 1968